PREME COURT, U. S.

FILED
MAY 27 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1482

TELECO, INC., a corporation,
Petitioner,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

EAGLETON, NICHOLSON, PATE & GILL
By JAMES R. EAGLETON
325 N.W. Third Street
Post Office Box 692
Oklahoma City, Oklahoma 73101

Attorney for Petitioner

May, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions, Statutes, Regulations and Tariffs Involved	3
Statement of Case	6
Reasons for Granting the Writ	9
1. The Tenth Circuit Court of Appeals has decided an important state question in a way which conflicts with the applicable State Law and Constitution	9
2. The Tenth Circuit Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court	9
Argument and Authorities	9
A. That the difference between Oklahoma and Pennsylvania as to the regulatory agency mandates the decision of significant state involvement	11
B. The act of termination to enforce a Corporation Commission's regulation as constituting state action within the meaning of both Article 2, §7 of the Oklahoma Constitution and the Fourteenth Amendment of the United States Constitution	13
Relief Requested by Petitioner	16

APPENDICES

PAGE

Appendix A: Memorandum Opinion of the District Court ..... i-xi

Appendix B: Opinion of the United States Court of Appeals ..... xii-xviii

Appendix C: United States Constitution, 14th Amendment xix

Appendix D: Oklahoma Constitution, Art. 2, §7 xix

Appendix E: Oklahoma Constitution, Art. 7, §1 ..... xix-xx

Appendix F: Oklahoma Constitution, Art. 9, §19 ..... xx-xxi

Appendix G: Oklahoma Constitution, Art. 9, §18 ..... xxii-xxiv

Appendix H: Oklahoma Constitution, Art. 9, §15 ..... xxiv-xxv

Appendix I: Rule 1 of Oklahoma Corporation Order No. 68516, Cause No. 23713 xxv

TABLE OF AUTHORITIES

CASES:

Bell v. Burson, 402 U.S. 535 (1971) 15

Blakeley v. Corporation Commission, 332 P.2d 1103 (Okla. 1958) 11

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9

Carrington v. Rash, 380 U.S. 89 (1965) 15

Caterphone, 13 FCC2d 420 (1968) 14

Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974) 15

F.P.C. v. Hope Natural Gas Company, 320 U.S. 591 (1944) 10

AUTHORITIES CONTINUED PAGE

Gibson v. Elmore City Telephone Company, 411 P.2d 551 (Okla. 1966) 11
Greyhound Lines, Inc. v. Corporation Commission, 430 P.2d 1 (Okla. 1967) 13
Hine v. Wadlington, 33 Okla. 173, 124 Pac. 299 (Okla. 1912) 11
Hixon v. Snug Harbor Water & Gas Company, 381 P.2d 313 (Okla. 1963) 11
Jackson v. Metropolitan Edison Company, 43 U.S. L.W. 4110 (1974) 9, 10, 13
Macom Products Corporation v. American Telephone & Telegraph Company, et al., CIV. No. 72-2722 HP (CD Cal. June 5, 1973) 14
Missouri, K. & P. Railroad Company v. Town of North Fork, 25 Okla. 325, 107 Pac. 172 (Okla. 1940) 13
Oklahoma Natural Gas Company, Application of, 406 P.2d 273 (Okla. 1965) 10
St. Louis-San Francisco Railroad Company v. State, 268 P.2d 845 (Okla. 1954) 11
Stanley v. Illinois, 405 U.S. 645 (1972) 15
United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) 15
Vlandis v. Kline, 412 U.S. 441 (1973) 15
Western Union Telegraph Company v. State, 31 Okla. 415, 121 Pac. 1069 (Okla. 1912) 11

CONSTITUTIONAL PROVISIONS:

United States Constitution, 14th Amendment 3, 13
Oklahoma Constitution, Art. 2, §7 ..... 3, 10
Oklahoma Constitution, Art. 7, §1 ..... 3, 12, 13
Oklahoma Contsitution, Art. 9, §15 11
Oklahoma Constitution, Art. 9, §18 ..... 4, 11
Oklahoma Constitution, Art. 9, §19 4

AUTHORITIES CONTINUED — PAGE

STATUTES:

28 U.S.C. §1254(1) 2
28 U.S.C. §1332 2

OTHER AUTHORITIES:

Davis, K., Administrative Law Treaties, Sections 7.02, et seq. (1958) 11-12

Rules of the Corporation Commission 4-5

Supreme Court Rules, Rule 36(1) 3, 8

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. ----------

TELECO, INC., a corporation,
Petitioner,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

OPINIONS BELOW

Petitioner would refer the Court to two (2) opinions rendered in this case by lower courts.

A. On February 7, 1974, the Federal District Court for the Western District of Oklahoma, the Honorable Fred A. Daugherty presiding, issued a memorandum opinion affirming respondent's Motion for Summary Judgment (Appendix A, hereto).

B. On February 24, 1975, the Tenth Circuit entered judgment affirming the District Court's sustaining of respondent's Motion (Appendix B, hereto).

JURISDICTION

Petitioner originally filed this action in State District Court. The respondent removed the action basing its jurisdiction upon diversity and the requisite amount. Respondent alleges it is incorporated in Missouri where its principal place of business is located. Therefore, jurisdiction was present pursuant to 28 U.S.C. § 1332.

Petitioner requests the Court to review the decisions of the lower courts. Jurisdiction of this matter is within this Court, pursuant to Title 28, U.S.C. §1254(1). There are no Orders respecting a rehearing, nor are there Orders granting an extension of time in which to petition for certiorari.

QUESTIONS PRESENTED FOR REVIEW

Petitioner contends that this case presents the following questions:

A. When the State of Oklahoma, through its Corporation Commission, allowed Southwestern Bell Telephone Company to establish tariffs which prohibit a customer from using direct electrical connections without a connecting arrangement installed by Southwestern Bell Telephone, does the termination of the customer's service for refusal to comply with this tariff constitute "state action" for the purposes of due process requisites of notice and hearing?

B. Does the establishment of the Oklahoma Corporation Commission, within the Oklahoma Constitution, with adjudicatory power require that the enforcement of its acts be accomplished after notice and hearing have been provided?

C. Did the District Court, by sustaining respondent's Motion for Summary Judgment, transform this regulation into a conclusive presumption; specifically, should the court have allowed the petitioner an opportunity to show that the admitted violation does not compromise the respondent's system?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND TARIFFS INVOLVED

Petitioner would show the Court that the following constitutional provisions, statutes, and regulations are involved in this case. All provisions not quoted are to appendices pursuant to Rule 36(1) Supreme Court Rules.

1. United States Constitution: 14th Amendment (Appendix C, page xix).

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

2. Oklahoma Constitutional Provisions:

   (a) Oklahoma Constitution Art. 2, §7 (Appendix D, page xix):

   "No person shall be deprived of life, liberty, or property without due process of law."

   (b) Oklahoma Constitution Art. 7, §1 (Appendix E, page xix).

(c) Oklahoma Constitution Art. 9, §18 (Appendix G, page xxii).

(d) Oklahoma Constitution Art. 9, §19 (Appendix F, page xx).

There are no Oklahoma statutes which petitioner feels are involved in the instant case.

1. Oklahoma Corporation Commission Order No. 68516, issued in Case No. 23713, rule No. 1:

"Filing of tariff offerings.

"All telephone utilities shall file with the Commission schedules of rates for all general offerings of intra-state services, both exchange and long distance, together with rules and regulations covering all such offerings. Said rate schedules shall include sufficient explanatory materials, maps, effective date, definitions, etc., as to make their application understandable and definite.

"Tariffs which do not establish rates for new offerings or increased rates on existing offerings of communication service, will be submitted not less than thirty (30) days in advance of their proposed effective dates. If the commission does not reject such tariff sheets in advance of their proposed effective dates, such tariffs shall be considered accepted by the Commission and binding upon the telephone company and the public, but shall not prejudice the Commission in any subsequent investigation.

"Tariff sheets which establish rates for new offerings or of service or increased rates on existing services shall be subject to the provisions of Rule 4 of this Order."

2. Tariffs:

Tariff filed by Southwestern Bell Telephone Company on February 1, 1969, providing:

"E. Connection of customer-provided communications systems.

1. General

Customer-provided and maintained systems may be connected at the service point of the customer on a voice-grade basis, with exchange and long distance message telecommunications service, either through a network controlled signaling unit and connecting arrangement, furnished, installed and maintained by the telephone company or through customer-provided equipment which affects such connections externally to a telephone company network controlling signaling units by means of an acoustical or inductive connection for transmitting and/or receiving . . . (General Exchange Tariff, Connections with Equipment or Facilities Provided by Customers, Original Sheet 31).

(b) Tariff filed by Southwestern Bell Telephone Company:

"I. Rules and regulations applying to all customers' contracts . . . [F]ailure on the part of the customers to observe these rules and regulations of the Company automatically gives Company the right to cancel the contract and discontinue this furnishing of service. (General Exchange Tariff, Rules and Regulations Applying to all Customers' Contracts, Tenth Revised Sheet 1, replacing Ninth Revised Sheet 1, and First Revised Sheet 1-a)."

STATEMENT OF CASE

This case involves an action for breach of contract and conversion arising out of the defendant's, hereinafter cited as the Telephone Company, act of suspending telephone service to plaintiff, hereinafter cited as Teleco. Two actions were originally filed in the Oklahoma County District Court. Both were removed to the United States District Court for the Western District of Oklahoma. Motions were filed to sever and remand the claims, but both motions were overruled. The Telephone Company made a motion for Summary Judgment, and the District Court granted the Telephone Company's motion. The Tenth Circuit affirmed the District Court's action. Teleco seeks to have the Summary Judgment reversed and a jury trial granted on the merits. Teleco further seeks a determination that it was deprived of its Constitutional right to due process of law.

In late 1965 or early 1966, Teleco was engaged in the business of selling electronic telephone answering and recording equipment. At this time and continuing until sometime in 1968, Teleco complied with the Telephone Company's tariff rules and regulations concerning direct electrical connections with its lines. In 1969, Teleco privately purchased connecting devices for use in its office and shop for testing and demonstration purposes. Teleco's use of the connecting devices was discovered by the Telephone Company, and Teleco was instructed to remove the connecting devices or its telephone service would be interrupted and suspended pursuant to the tariff rules and regulations.

Teleco, by and through its President, Mr. Bill Patterson, had numerous conversations concerning this matter with a number of representatives of the Telephone Com-

pany culminating in a telephone conversation with Mr. Robert D. Allen, General Counsel for the Telephone Company. Mr. Allen informed Teleco's president: (1) that unless tariff rules and regulations were complied with, telephone service would be interrupted and suspended; (2) that to comply with the tariff, the connecting devices must be disconnected from the Telephone Company's lines. *The connecting devices then in use by Teleco were identical to those supplied by the Telephone Company.* The Telephone Company's objection was not that the connecting devices were not the same as those required by the tariff rules and regulations, but simply that they were not installed and maintained by the Telephone Company. Teleco refused to alter the alignment of its connecting devices and no action was taken by the Telephone Company.

In 1972, Teleco went into business directly in competition with the Telephone Company in that it handled a full spectrum of telephone equipment. Teleco requested that the Telephone Company supply it with the appropriate connecting devices in order that it might install its privately owned equipment in its office. A series of conversations and letters followed. Teleco made every reasonable effort to comply with the tariff rules and regulations. *Teleco requested that when the connecting devices were attached, it be permitted to continue its single-line instruments intact;* said single-line instruments then being leased by Teleco from the Telephone Company. But the Telephone Company insisted that Teleco's request involved the supplying of a network access line and an additional charge. On June 23, 1972, Teleco asked for an explanation of why a network access line was necessary and why there was an additional

charge. Teleco merely wanted the standard connecting devices or an explanation of the Telephone Company's right to make an additional charge since the standard $17.00 per month business phone charge ordinarily includes a telephone instrument. No explanation or justification was forthcoming. The Telephone Company refused to install the connecting devices and on June 29, 1972, notice was given to Teleco that service would be interrupted and suspended within ten days; *no hearing was held at any time prior to suspension of telephone service.*

On July 14, 1972, the Telephone Company wrongfully and arbitrarily interrupted and suspended telephone service to Teleco's place of business in Oklahoma City, Oklahoma, alleging violation of the tariff, to-wit: direct connection of privately owned telephone equipment to telephone lines. Service was interrupted and suspended for a period of five or six days, ending on July 19, 1972. Teleco brought a mandamus action to force the Telephone Company to restore service. Only after the mandamus action was brought was an agreement reached by which the Telephone Company agreed to resume immediately telephone service to Teleco. *The agreement was identical to the request Teleco had made prior to the Telephone Company's wrongful and arbitrary interruption and suspension of telephone service.*

The Telephone Company's insistence on compliance with the tariffs, *i.e.*, the installation of the Southwestern Bell-owned connecting devices, did not arise until Teleco went into direct competition with the Telephone Company in the private telephone equipment industry, at which time it chose to assert its position of power in an attempt to stifle the competition of Teleco.

REASONS FOR GRANTING THE WRIT

Petitioner requests that this Court exercise its discretion and grant the writ of certiorari for the following reasons:

1. The Tenth Circuit Court of Appeals has decided an important state question in a way which conflicts with the applicable State Law and Constitution.

2. The Tenth Circuit Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court.

ARGUMENT AND AUTHORITIES

It is petitioner's position that there is a sufficiently close nexus between the State of Oklahoma and the challenge action by respondent that that action may fairly be treated as that of the State of Oklahoma.

Petitioner is aware that this Court recently decided that under certain circumstances, termination of service by a regulated entity does not constitute "state action" as that term is used to invoke the Fourteenth Amendment. *Jackson* v. *Metropolitan Edison Company*, 43 U.S.L.W. 4110 (1974).

Petitioner urges the Court to examine the facts and circumstances of the instant case as set out below in determining the question of state action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

In affirming the District Court's sustaining of respondent's Motion for Summary Judgment, the Court of Ap-

peals placed great reliance in this Court's decision in the case of *Jackson* v. *Metropolitan Edison Company, supra* (See Appendix B, page xv). Petitioner feels that *Jackson* and the instant case, while both involve termination, are distinguishable, and that the distinctions are significant enough that in *Jackson* there was no state action; whereas, in the instant case, there is state action. Therefore, this action involves an unconstitutional deprivation of due process.

First, petitioner contends that the laws of Oklahoma vary significantly from those in Pennsylvania as to the operation and significance of the regulatory agencies. Second, petitioner distinguishes the two cases on the basis of the reason for which termination was utilized. In *Jackson*, termination did no more than enforce the public utility's right to reasonable compensation. Such a right has been fully adjudicated and the utility's constitutional right to such cannot seriously be questioned. *Application of Oklahoma Natural Gas Company, Oklahoma*, 406 P.2d 273 (Okla. 1965); *F.P.C.* v. *Hope Natural Gas Company*, 320 U.S. 591 (1944). In the present case, termination was utilized to enforce what petitioner feels to be an unconstitutional gratuity conferred upon respondent by the Oklahoma Corporation Commission. Finally, petitioner feels that the Court of Appeals failed to correctly determine the question as to whether or not termination constituted "state action" within the meaning of Article 2, §7 of the Oklahoma Constitution, and the Fourteenth Amendment of the United States Constitution. Petitioner will discuss each of these positions as presented.

A.

THAT THE DIFFERENCE BETWEEN OKLAHOMA AND PENNSYLVANIA AS TO THE REGULATORY AGENCY MANDATES THE DECISION OF SIGNIFICANT STATE INVOLVEMENT.

In Oklahoma, unlike Pennsylvania, the Corporation Commission is founded in the Constitution itself. Oklahoma Constitution Article 9, §15. The rules and regulations are issuable, not as a matter of legislative fiat, but by Constitutional mandate. Oklahoma Constitution Article 9, §18; *St. Louis-San Francisco Railroad Company* v. *State*, 268 P.2d 845 (Okla. 1954). The exercise of these powers is irrevocably vested in the Corporation Commission; however, they are reviewable by the courts. *Gibson* v. *Elmore City Telephone Company*, 411 P.2d 551 (Okla. 1966). In reviewing the Corporation Commission's regulations, courts of Oklahoma have always applied tests of a Constitutional nature. *Hixon* v. *Snug Harbor Water & Gas Company*, 381 P.2d 313 (Okla. 1963); *Blakely* v. *Corporation Commission*, 332 P.2d 1103 (Okla. 1958); *Hine* v. *Wadlington*, 33 Okla. 173, 124 Pac. 299 (Okla. 1912); *Western Union Telegraph Company* v. *State*, 31 Okla. 415, 121 Pac. 1069 (Okla. 1912).

The Court of Appeals in deciding that there was no requirement for due process in the instant case stated in its opinion at page 6 (Appendix B, page xvi):

> ". . . In adopting rules governing service, the Corporation Commission exercises a delegated legislative function, and does not adjudicate factual disputes so as to invoke the due process requirements of notice and hearing."

This rule is generally true as the court's authority shows. K. Davis, *Administrative Law Treaties*, Sections

7.02, *et seq.* (1958). However, in Oklahoma the Court of Appeals' syllogism is flawed because of an express constitutional provision giving the Corporation Commission adjudicatory powers. Oklahoma Constitution Art. 7, §1.

> "The judicial power of this state shall be vested in the Senate, sitting as a Court of impeachment, a Supreme Court, the Court of Criminal Appeals, the Court of the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate Courts as may be provided by statute, District Courts, *and such boards, agencies and commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings.* Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review, and such boards, agencies and commissions as have been established by the statute shall continue in effect, subject to the power of the legislature to change or abolish said courts, boards, agencies, or commissions. Municipal Courts in cities or in corporate towns shall continue in effect and shall be subject to creation, abolition or alteration by the legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns, or of duly adopted regulations authorized by such ordinances."

As previously mentioned, the Corporation Commission is created by the Oklahoma Constitution. To petitioner's knowledge, Oklahoma is the only state with such a constitutional provision. Once a regulation is to be enforced, the due process requirements of notice *and hearing* must be provided. The District Court's sustaining of the Motion for Summary Judgment barred any opportunity for hearing.

B.

THE ACT OF TERMINATION TO ENFORCE A CORPORATION COMMISSION'S REGULATION AS CONSTITUTING STATE ACTION WITHIN THE MEANING OF BOTH ARTICLE 2, §7 OF THE OKLAHOMA CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As Article 7, §1, *supra*, of the Oklahoma Constitution shows, the Corporation Commission adjudicates factual disputes. This factor, combined with the pervasive regulation and monopoly power, distinguish the instant case from *Jackson* sufficiently for state action to be absent in the latter, but present in the former. Petitioner contends that the finding of a termination does not mandate a finding of no state action. Rather termination must be viewed as a single factor; albeit significant, in determining whether or not state action is present.

The Court in the *Jackson* case pointed out that the Pennsylvania courts had rejected the contention that the furnishing of utility services are either state functions or municipal duties. 43 U.S.L.W. 4101, 4112. Oklahoma has given the Corporation Commission the power to order that the public be provided with service. *Missouri, K. & P. Railroad Company* v. *Town of North Fork*, 25 Okla. 325, 107 Pac. 172 (Okla. 1940). The Corporation Commission can intervene to prevent the termination of a public carrier, despite private agreements. *Greyhound Lines, Inc.* v. *Corporation Commission*, 430 P.2d 1 (Okla. 1967). These broad powers evidence a philosophy that the State should be intimately involved in the supplying of utility services.

The Court in *Jackson* also refers to the absence of a grant of monopoly to the respondent in that case. Or more properly, the Court found no relationship between whatever monopoly power did exist, and the challenged action. Petitioner has throughout this litigation made the point that respondent's monopoly position is the primary factor in its, respondent's, determination to terminate service to petitioner. Unlike the regulation in *Jackson*, which merely provided the public utility receive a fair return for its service, the regulation in this case serves to unfairly perpetuate respondent's position as the chief supplier of telephonic equipment. It is because of respondent's monopolistict position that the regulation is enforced. *Caterphone*, 13 FCC2d 420 (1968); *Macom Products Corporation* v. *American Telephone & Telegraph Company, et al.*, CIV. No. 72-2722 HP (CD Cal. June 5, 1973). The distinction is obvious, in *Jackson*, the public utility had a right to reasonable compensation, and the issue was clearly decided correctly. In the instant case the respondent is not entitled to governmental protection in its monopolistic position as a supplier of telephone equipment.

It is petitioner's position that respondent's only interest in such a regulation as is presently involved should be based solely upon a desire to preserve the integrity of its system. It is petitioner's further position that if the evidence be presented, petitioner's actions would not be found to compromise respondent's system in any way.

The regulation involved, as interpreted by the District Court, constitutes a presumption which the petitioner was not allowed to dispute. Such a presumption cannot with-

stand constitutionally required scrutiny. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Cleveland Board of Education* v. *LeFleur*, 414 U.S. 632 (1974). If, as petitioner contends, the only valid state purpose behind such a regulation is the maintenance of respondent's system's integrity, the court should have allowed an individualized hearing, instead of its categorical renunciation of petitioner's act. Respondent was not required to produce evidence of systematic abuse such that this regulation could be considered prophylactic in nature; to the contrary, respondent had merely to file its tariff, wait thirty days, and enforce it through termination.

It is petitioner's contention that at the very least, the courts below should have construed the regulation as creating merely a rebuttable presumption. Viewed from either a due process or equal protection vantage, the regulation in question creates either a conclusive presumption or an unconstitutional over-inclusive category. This regulation, becoming effective without any required evidentiary proceeding, must fall under the gaze of either close judicial scrutiny or a minimum rationality approach.

RELIEF REQUESTED BY PETITIONER

Petitioner requests that the decisions of the Tenth Circuit and that of the District Court be reversed. Further, petitioner requests that this case be remanded for a trial on the merits.

Respectfully submitted,

EAGLETON, NICHOLSON, PATE & GILL
By JAMES R. EAGLETON
325 N.W. Third Street
Post Office Box 692
Oklahoma City, Oklahoma 73101

Attorney for Petitioner

May, 1975

APPENDIX "A"

FILED
FEB 7 1974
REX B. HAWKS
Clerk, U. S. District Court
By VERA EDDLEMAN
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TELECO, INC., a corporation,	)	
	)	
Plaintiff,	)	
-vs-	)	Case No. 73-204-D
	)	Civil
SOUTHWESTERN BELL TELEPHONE COMPANY, a corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Defendant is a supplier of telephone service to the public in Oklahoma under tariffs filed with the Oklahoma Corporation Commission. Article 9, Sections 34 and 18, Oklahoma State Constitution. Plaintiff was and is one of its customers. Plaintiff connected some of its privately owned telephone equipment to the Defendant's telephone facilities by "direct electrical connection" or what is sometimes called to "hard wire" directly into Defendant's telephone system. Defendant advised Plaintiff that such connection violated its tariffs[1] filed with the Oklahoma Corporation Commission in that under the same such a connection could only be accomplished by use of a Defendant-installed "coupler" or connecting arrangement or device (STC) with

[1] By its Order No. 68516 issued in Case No. 23713, the Oklahoma Corporation Commission established General Telephone Rules and Regulations. Rule 1 provides for the filing of tariff offerings and stipulates that such tariffs are binding upon the telephone company and the pub-

monthly charges for the same to be paid by Plaintiff.[2] Defendant requested that Plaintiff cease such violation. Plaintiff refused. Defendant then delivered written notice to Plaintiff that its telephone service would be interrupted and suspended unless Plaintiff ceased its violation of De-

---

[1] (Continued)

lic. The pertinent tariff here involved and which became effective April 1, 1969 provides:

"E. Connection of Customer-Provided Communications Systems.

1. General

Customer-provided and maintained systems may be connected at a service point of the customer, on a voice grade basis, with exchange and long distance message telecommunications service either through a network control signaling unit and connecting arrangement, furnished, installed and maintained by the Telephone Company or through customer-provided equipment which affects such connections externally to a Telephone Company network control signaling unit by means of an acoustic or inductive connection for transmitting and/or receiving . . ." (General Exchange Tariff, Connections with Equipment or Facilities Provided by Customers, Original Sheet 31).

Note: Plaintiff's equipment was not an acoustic or inductive system.

[2] The pertinent tariff providing for a monthly charge payable by the Plaintiff for the above connecting arrangement as a special assembly reads as follows:

"A. Special assemblies of equipment consist of modifications of standard equipment, special equipment or service arrangements for which provision is not otherwise made in this tariff. They will be furnished, when practicable, by the telephone company at charges equivalent to the estimated cost of furnishing such equipment and arrangements if in connection with and not detrimental to any of the services furnished under the company's tariffs" (General Exchange Tariff, Special Assemblies of Equipment, Original Sheet 1).

Note: Plaintiff was advised of a monthly charge of $6.00 for the connecting arrangement to which charge it objected. Under the written agreement by which service was restored to Plaintiff it was agreed that said charge would not be enforced against Plaintiff but would accumulate until a decision is made by the Oklahoma Corporation Commission as to the validity of the rate. Plaintiff has dismissed the proceeding before the Oklahoma Corporation Commission which would have decided this matter.

fendant's filed tariff within ten days.[3] Plaintiff refused and after such period of time expired Defendant interrupted and suspended telephone service to Plaintiff. Such interruption of service continued for approximately five days. The parties reached an agreement in writing whereupon the telephone service was restored and continues today.[4]

The Plaintiff brought two State Court actions against the Defendant, the first for an alleged breach of contract by Defendant and the second for an alleged conversion of

---

[3] Another tariff filed with the Oklahoma Corporation Commission provides in part:

"I. Rules and Regulations applying to all customers' contracts.

". . . Failure on the part of customers to observe these rules and regulations of the company automatically gives the company the right to cancel the contract and discontinue the furnishing of service." (General Exchange Tariff, Rules and Regulations Applying to all Customers' Contracts, 10th Revised Sheet 1 Replacing 9th Revised Sheet 1 and 1st Revised Sheet 1-A)

[4] This letter agreement reads as follows:

"July 19, 1972

Mr. Robert D. Allen
Attorney at Law
Southwestern Bell Telephone Company
707 North Robinson
Oklahoma City, Oklahoma

Re: Agreement between Teleco, Inc. and
Southwestern Bell Telephone Company

Dear Mr. Allen:

This letter is for the purpose of stating the agreement we verbally reached on behalf of our respective clients.

The agreement reached is as follows:

1. Teleco, Inc. agrees not to violate any filed Southwestern Bell Telephone Company General Exchange Tariff; specifically, not to 'hard wire' or wire directly into the telephone system.

2. Southwestern Bell Telephone Company agrees to immediately install requested connecting devices (STC) at the business location of

[APPENDIX]

Plaintiff's own telephone equipment by Defendant, both actions being based on Defendant's said interruption and suspension of telephone service to Plaintiff. In these actions the only relief sought by Plaintiff is the recovery of actual and punitive monetary damages. These two State Court actions have been removed by Defendant to this Court in one Petition for Removal. They were given the captioned number. The Court has ordered the two removed State Court petitions consolidated for disposition in this Court. Rule 42(a), Federal Rules of Civil Procedure.

---

[4] (Continued)

Teleco, Inc. and connect a telephone instrument to the line in conjunction with each STC.

3. Southwestern Bell Telephone Company agrees to forthwith reinstate normal telephone service to Teleco, Inc. with the same service and telephone numbers previously enjoyed by Teleco, Inc.

4. A charge for the added telephone instrument will be billed monthly to Teleco, Inc. at any existing tariff; that said charge is agreed not to be enforced against Teleco, Inc. but will accumulate until a decision is made by the Oklahoma Corporation Commission as to the validity of the rate. In the event the rate is upheld by the Commission, Teleco, Inc. agrees to pay said accumulated charges forthwith. In the event the charge is rejected by the Commission, Southwestern Bell Telephone Company agrees to forthwith delete said accumulated charge from Teleco's billing and will not bill said charge in the future

This agreement in writing incorporated all the verbal agreements heretofore reached by the respective parties.

Cordially,

Collier H. Pate
CHP/nr

I have read the above agreement, and on behalf of Teleco, Inc., as its attorney, agree to all points contained therein, effective July 19, 1972.

Collier H. Pate
Attorney for Teleco, Inc.

I have read the above agreement and on behalf of Southwestern Bell Telephone Company, as its attorney, agree to all points contained therein, effective July 19 1972.

Robert D. Allen, Attorney for
Southwestern Bell Telephone Company"

To Plaintiff's claims the Defendant denies it breached a contract with Plaintiff or converted Plaintiff's telephone equipment, asserting that Plaintiff violated the aforementioned tariffs filed with the Oklahoma Corporation Commission and therefore its contract with Defendant and upon such violation Defendant had both the right and duty to interrupt Plaintiff's telephone service after Plaintiff refused to desist in such tariff violations after written notice.

In the above posture, the Court has under consideration Defendant's Motion For Summary Judgment on Plaintiff's claims for breach of contract and conversion which Motion is supported by several documents. Plaintiff opposes the Motion. Both parties have filed Briefs to the Motion and the Court has heard oral arguments on the same.

Tariffs filed with the Oklahoma Corporation Commission "are the law." *Shehi* v. *Southwestern Bell Telephone Company*, 382 F. 2d 627 (Tenth Cir. 1967). Also see *Palermo* v. *The Bell Telephone Company of Pennsylvania*, 415 F. 2d 298 (Third Cir. 1969); *Carrigan* v. *Sunland-Tujunga Telephone Company*, 263 F. 2d 568 (Ninth Cir. 1959) cert. den. 79 S.Ct. 893; *Western Union Telegraph Company* v. *Esteve Bros. & Co.*, 256 U.S. 566 (1921); *Carter* v. *American Telephone & Telegraph Company*, 365 F. 2d 486 (Fifth Cir. 1966) cert. den. 385 U.S. 1008 (1967). In the *Carter* case the Court said:

> ". . . a tariff required by law to be filed is not a mere contract. It is the law."

The regulation of telephone service in Oklahoma falls within the police power of the state. *Blakeley* v. *Corporation Commission*, 332 P. 2d 1103 (Okla. 1958). A regulated telephone company has the duty under Oklahoma law to serve the public without discrimination. *Hixon* v. *Snug Harbor Water & Gas Co.*, 381 P. 2d 308 (Okla. 1963). The right to telephone service is not an inherent right but a

right to be exercised under the police power of the state and may be limited by conditions of tariffs. *Smith* v. *Southern Bell Tel. Co.*, 104 S.W. 2d 1961 (Ky. 1937); *Wilkinson* v. *New England Tel. & Tel. Co.*, 97 N.E. 2d 413 (Mass. 1951); *Palma* v. *Powers*, 295 F. Supp. 924 (N.D. Ill. 1969).

Thus, the pertinent tariffs (as the law) became a part of any contract between Plaintiff and Defendant with reference to Plaintiff's telephone service[5] and as Plaintiff has admitted a tariff violation by its "direct electrical connection"[6] and admits receipt of notice from Defendant of such claimed "hard wire" tariff violation and of Defend-

---

[5] 17 AmJur 2d, Contracts, Section 257, Page 654-6 provides:

"Law as part of, and as controlling, contract.

It is a general rule that contracting parties are presumed to contract in reference to the existing law; indeed, they are presumed to have in mind all the existing laws relating to the contract, or to the subject matter thereof. Thus, it is commonly said that all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention."

Loveless Mfg. Co. v. *Roadway Exp.*, 104 F. Supp. 809 (N.D. Okla. 1952) provides in part:

"There is numerous authority for the proposition that where motor carriers engaged in interstate commerce have on file tariffs stating their rates and regulations, that such tariffs are binding on all parties concerned and have the force and effect of law. Jackson & Perkins Co. v. Mushroom Transportation Co., 351 Pa. 583, 41 A.2d 635, certiorari denied 326 U.S. 733, 66 S.Ct. 42, 90 L.Ed. 427; Annotations to 49 U.S. C.A. §§ 319, 20 (11, 12). The tariffs bind the parties whether they have actual notice of them or not and are a part of the contract of carriage along with the bill of lading."

Also see *General Electric Company* v. *Mortiz*, 270 F. 2d 780 (Fourth Cir. 1959).

[6] During oral arguments on the Motion under consideration the following occurred:

"THE COURT: Well now, does the plaintiff acknowledge that they attach a device to the defendant's system by direct electrical connection?"

ant's intention to suspend Plaintiff's telephone service for such violation unless the violation was discontinued, which notice the Court deems to be reasonable as a matter of law, and as a further tariff filed with the Oklahoma Corporation Commission provides that the Defendant may discontinue service to a customer who violates a tariff, Plaintiff's claim that Defendant breached a contract between them by enforcing the tariff and interrupting Plaintiff's telephone service upon Plaintiff's refusal to desist in a tariff violation is without merit as a matter of law. To the contrary, it is conclusively shown that Plaintiff violated the contract between the parties regarding telephone service.

Plaintiff's next claim that Defendant has converted its privately owned telephone equipment by the interruption of telephone service to the Plaintiff is without legal foundation. There is no claim made by Plaintiff that Defendant has physically taken possession of Plaintiff's privately owned telephone equipment. "Conversion" is any distinct act of dominion wrongfully exerted over personalty of another in denial of or inconsistent with his rights therein. *Benton* v. *Ortenberger*, 371 P. 2d 715 (Okla. 1962). As stated above the right to telephone service is not an inherent right but a right to be exercised under the police power of the state and may be limited by tariffs. The right to telephone service is not personalty or personal property which is capable of being converted, the right is not a vested right but in reality a privilege. *U. S. Light & Heat Corp.* v. *Niagara Falls Gas & E. L. Co.*, 47 F. 2d 567 (Second Cir. 1931) cert. den. 283 U.S. 864; *Midland Realty Co.* v.

---

[6] (Continued)

"MR. PATE: Yes, sir, we do."

"THE COURT: And do you also acknowledge that this was not done through an interconnection arrangement installed by the defendant telephone company?"

"MR. PATE: Yes sir, we do."

(Transcript of hearing, pp. 25-26)

Kansas City Power & Light Co., 300 U.S. 109 (1936). The Court therefore concludes under the undisputed facts before the Court that Defendant did not take possession of or commit an act of dominion over Plaintiff's telephone equipment by interrupting its service to Plaintiff and convert the same to its own use. But, if it could be said that Defendant committed an act of dominion over Plaintiff's telephone equipment by interrupting its telephone service to Plaintiff it was not a *wrongful* domination *in denial of Plaintiff's rights in said equipment* as shown elsewhere herein. Any such domination would have been lawful, not wrongful, because Plaintiff violated a tariff and Defendant thereupon had the right and duty to interrupt service after notice. Moreover, Plaintiff was attempting to use its own telephone equipment in excess of its rights to use the same in connection with Defendant's regulated telephone facilities.

Thus, Plaintiff's conversion claim is without legal basis and must fail. No factual disputes are involved regarding this claim and it must fail as a matter of law.

In its Briefs filed herein in connection with Defendant's Motion For Summary Judgment, the Plaintiff has raised several legal issues which though not plead will nonetheless be considered by the Court. Plaintiff's claim of estoppel and/or waiver on the basis that Defendant had lengthy prior notice of Plaintiff's "direct electrical connection" to its facilities and by doing nothing over a considerable period of time because estopped to interrupt Plaintiff's telephone service and/or waived the application of its tariffs in this respect as to Plaintiff is without legal merit as a matter of law under the undisputed facts of the situation at bar. These familiar legal doctrines might apply in a controversy between private individuals. However, they do not apply in a situation involving the enforcement of tariffs filed with the Oklahoma Corporation Commission in its supervision, regulation and control of telephone companies doing business in Oklahoma. *Shehi* v. *Southwestern*

Bell Telephone Company, supra; Atchison, Topeka and Santa Fe Ry. Co. v. *John Sexton & Co.*, 339 F. Supp. 1202 (D. Kans. 1972); *Western Union Telegraph Company* v. *Woods*, 266 S.W. 179 (Tex. 1924); *Building Industries Exhibit, Inc.* v. *Public Utilities Commission*, 80 N.E. 2d 836 (Ohio 1948); *Coosa Valley Telephone Company* v. *Martin*, 133 S. 2d 505 (Ala. 1961); *Komatz Construction, Inc.* v. *Western Union Telegraph Company*, 186 N.W. 2d 691 (Minn. 1971) cert. den. 404 U.S. 856 (1971); *Kerns* v. *Western Union Telegraph Company*, 198 S.W. 1132 (Mo. 1917); *Williams* v. *Western Union Telegraph Company*, 275 S.W. 570 (Mo. 1925); *Western Union Telegraph Company* v. *Gurtar*, 295 S.W. 660 (Tx. 1927); *Postal Telegraph-Cable Company* v. *Howe*, 211 P. 358 (Nev. 1923). There is no waiver or estoppel here.

Plaintiff also complains of lack of due process of law to it by not being afforded notice and a hearing before Defendant's tariffs filed with the Oklahoma Corporation Commission became effective and by not receiving notice and an opportunity to be heard before Defendant interrupted Plaintiff's telephone service. Plaintiff also claims that it requested the Defendant to install the required "coupler" but that Defendant arbitrarily refused to install the same.

Plaintiff's claim of lack of due process of law by not receiving notice of and an opportunity to be heard before Defendant's tariffs filed with the Oklahoma Corporation Commission became effective is without merit. The tariff procedure utilized under law by state agencies supervising companies which provide public service to the people has been described and characterized as being legislative in nature. And being legislative in nature a due process hearing is not necessary before tariffs become effective. *Washington Gas Light Co.* v. *Virginia Electric And Power Co.*, 438 F. 2d 248 (Fourth Cir. 1971); *Lewis* v. *Potomac Electric Power Co.*, 64 F. 2d 701 (D.C. Cir. 1933). This position

of Plaintiff is without merit. Moreover, Plaintiff had and has available to it a legal process before the Oklahoma Corporation Commission in which it can make objections to any tariffs filed with the Commission and have a due process hearing thereon if it so desires. See Oklahoma Corporation Commission Rules of Practice, effective date January 1, 1970; *Blakeley* v. *Corporation Commission*, 332 P. 2d 1103 (Okl. 1958).

As to the complaint that Plaintiff was not given notice and an opportunity to be heard before Defendant interrupted its telephone service, it is undisputed that Plaintiff did receive actual notice of an interruption to be suffered in its telephone service and the reason why. In *DiGiacomo* v. *Diamond State Telephone Company*, 356 F. Supp. 1063 (Del. 1973) it is held that an action for damages (the only relief sought herein) will not lie for the interruption and termination of telephone service where reasonable prior notice of such interruption or termination has been given the customer.[7] As above stated, it is admitted that Defendant gave prior notice to Plaintiff before termination. The Court finds that the notice as specified and the time period prescribed therein were reasonable as a matter of law. The tariffs as heretofore set out permit service interruption upon a tariff violation. Under the undisputed facts herein Plaintiff's Complaint of not receiving due process of law in connection with Defendant's termination of telephone service to it is without merit as a matter of law. Plaintiff's right to receive telephone service from defendant does not rise to the level of a constitutional right. See *Jackson* vs. *Metropolitan Edison Company*, 483 F2d 754 (Third Cir.

---

[7] Also see *Tollin* v. *Diamond State Telephone Co.*, 286 F. Supp. 86 (U.S. D.C. Del. 1968); *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (Ninth Cir. 1959) cert. den. 79 S.Ct. 893; *Coosa Valley Telephone Company* v. *Martin*, 133 So. 2d 505 (Ala. 1961); *Plate* v. *Southern Bell Telephone & Telegraph Co., Inc.*, 98 F. Supp. 355 (E.D. S.C., 1951); *Johnson* v. *General Telephone Company of the S.E.*, 135 S.E. 2d 854 (S.C. 1964).

1973). There is no merit to this complaint of Plaintiff as a matter of law.

To Plaintiff's complaint that it requested Defendant to install a "coupler" and Defendant arbitrarily refused the request, the Defendant asserts that Plaintiff's request for the installation of the "coupler" was conditioned upon Defendant making no charge in connection with the coupler as required by the tariffs. This assertion is not disputed. Had Defendant so agreed it would become a party to a tariff violation. *Atchison, Topeka & Santa Fe Ry. Co.* v. *John Sexton & Co., supra.* Such conditional request was properly refused by Defendant. Moreover, this complaint is clearly one for the Plaintiff to present to the Oklahoma Corporation Commission. Article 9, Sections 18 and 20, Oklahoma State Constitution; 17 Oklahoma Statutes 152; *Wood* v. *Public Utilities Commission,* 481 P. 2d 823 (Cal. 1971).

The Court finds and concludes that there are no genuine issues of material facts involved in this case and that Defendant accordingly should be granted Summary Judgment dismissing Plaintiff's action as the same does not contain a claim against Defendant upon which Plaintiff is entitled to relief as a matter of law. Counsel for Defendant will prepare an appropriate Judgment based on the foregoing, present same to opposing counsel and then to the Court for signature and entry herein.

Dated this 7th day of February, 1974.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX "B"

FILED
FEB 24 1975
HOWARD K. PHILLIPS
Clerk, United States
Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

TELECO, INC., a corporation,	)	
Plaintiff-Appellant,	)	No. 74-1162
	)	(73-204-D)
v.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY, a corporation,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Collier H. Pate of Eagleton, Nicholson & Pate, Oklahoma City, Oklahoma, for Appellant.

Robert D. Allen, Oklahoma City, Oklahoma, (William J. Free, Nancy Batchelor and O. Carey Epps, Oklahoma City, on the brief) for Appellee.

Before LEWIS, Chief Judge, PICKETT and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

Teleco, Inc., an Oklahoma corporation, appeals from a summary judgment entered in the United States District Court for the Western District of Oklahoma dismissing this diversity action against Southwestern Bell Telephone Company, a Missouri corporation, for breach of contract and tortious conversion of its property. We affirm the judgment of the district court.

Southwestern Bell supplies telephone service to the public in Oklahoma under tariffs filed with the Oklahoma Corporation Commission. Teleco, which is engaged in the business of selling electronic telephone answering and recording equipment, is one of Southwestern Bell's customers. In 1972, Teleco connected its own telephone equipment to Southwestern Bell's telephone network by means of a "direct electrical connection." Southwestern Bell advised Teleco that such direct connections with its system violated tariffs that permit private connections other than inductive or acoustic connections only by means of a coupler installed by Southwestern Bell.[1] The latter requested Teleco to cease its violation of these "foreign attachment" tariffs, but Teleco refused. Southwestern Bell then gave Teleco

---

[1] The pertinent section of Oklahoma's General Exchange Tariff, effective April 1, 1969, provides:

> Customer-provided and maintained systems may be connected at a service point of the customer, on a voice grade basis, with exchange and long distance message telecommunications service either through a network control signaling unit and connecting arrangement, furnished, installed and maintained by the Telephone Company or through customer-provided equipment which affects such connections externally to a Telephone Company network control signaling unit by means of an acoustic or inductive connection for transmitting and/or receiving. . . .

Other provisions of the General Exchange Tariff prohibit connections not authorized elsewhere in the Tariff. These provisions entitle the utility to discontinue the telephone service of persons making unauthorized attachments or connections.

ten days' written notice that its telephone service would be cut off unless Teleco complied with the tariffs. Teleco refused to comply. On July 14, 1972, Southwestern Bell suspended service. Five days thereafter the parties resolved their dispute in a written agreement; on July 19, 1972, telephone service was resumed and has not since been interrupted.

Teleco brought two state court actions against Southwestern Bell, the first predicated on a breach of contract theory and the second upon the theory that Southwestern Bell had tortiously converted Teleco's property. Both actions arose from Southwestern Bell's five-day suspension of service; the sole relief sought was monetary damages. Southwestern Bell removed both actions to the United States District Court, which consolidated them for trial. The district court granted summary judgment for Southwestern Bell as to Teleco's conversion claim for three reasons. First, since telephone service is not personal property, it cannot be the subject of a tortious conversion. Second, since the telephone company never took physical possession of or exercised dominion over Teleco's equipment, it cannot be said to have converted Teleco's property. Third, Southwestern Bell's interruption of service, whether or not characterized as an act of dominion over Teleco's personalty, was not wrongful since the utility acted in accordance with tariffs filed with the Oklahoma Corporation Commission. Teleco does not apparently press the conversion issue in this appeal. Accordingly, we merely note that the district court's conclusions are fully supported by Oklahoma law. *See* Benton v. Ortenberger, 371 P_2 715 (Okla.).

Teleco's second claim is that, by interrupting Teleco's telephone service, Southwestern Bell breached its contract for service with Teleco. Southwestern Bell replies that Teleco's compliance with tariffs governing the responsibilities of telephone customers constituted a condition precedent to the utility's continuing obligation to provide serv-

ice.[2] Since Teleco concedes having violated the foreign attachment tariffs, Southwestern Bell argues that it was entitled to discontinue service to Teleco. In this appeal, however, Teleco contends that for reasons discussed below Southwestern Bell cannot offer Teleco's tariff violation as a defense to breach of the service contract.

Teleco first contends that Southwestern Bell deprived Teleco of its fourteenth amendment rights to procedural due process by interrupting its telephone service without a hearing. This argument fails under the rule recently announced in Jackson v. Metropolitan Edison Co. U.S. , 43 U.S.L.W. 4110. There the Supreme Court held that the state of Pennsylvania was not sufficiently connected with a telephone company's termination of service to a customer as to entitle the customer to the procedural rights guaranteed against state action by the fourteeenth amendment. The Court significantly noted that although the telephone company may have been required by Pennsylvania law to obtain state approval of the practices that precipitated the customer's termination, the state's regulatory body did not "put its own weight on the side of the proposed practice by ordering it." 43 U.S.L.W. at 4114. In *Jackson* as in the present case, the challenged tariffs became effective automatically after the utility had filed them with the state regulatory agency for a specified period without objection. *See* Okla. Const. art. 9, § 18; Okla. Corporation Commission Order No. 68516, Rule 1. Thus, the actual involvement of the state in the promulgation of tariffs is the same as at issue in *Jackson*. For these reasons we believe that *Jackson*

---

[2] The Oklahoma Corporation Commission's rules and regulations governing public telephone service provide that duly filed tariffs are binding upon both the telephone company and the public. Order No. 68516, Rule 1. *See also* Southwestern Bell Telephone Co. v. Cox, 375 P_2 972 (Okla.). The General Exchange Tariff provides: "The Telephone Company may discontinue service which is used: . . . f. In a manner which violates any of the lawful regulations of the Telephone Company."

applies to the present case and that Southwestern Bell's interruption of service to Teleco did not amount to state action as contemplated by the fourteenth amendment.

Teleco next argues that the manner in which Southwestern Bell's foreign attachment tariffs were promulgated violated its rights to due process. Without reference to any authority, Teleco generally asserts that it was entitled to "extensive" notice of the filed tariffs and that failure to provide it with such notice infringed upon its rights. Rules of the Oklahoma Corporation Commission provide that tariffs become effective thirty days after they are filed with the Commission and absent rejection from the Commission. Order No. 68516, Rule 1. The Commission's rules, however, do not require notice to the public or to interested parties. Teleco concedes that the foreign attachment tariffs were filed in accordance with Commission rules. In adopting rules governing service, the Corporation Commission exercises a delegated legislative function and does not adjudicate factual disputes so as to invoke the due process requirements of notice and hearing. Woods v. Public Utilities Commission, 481 P_2 823, 825 (Cal.), *appeal dismissed*, 404 U.S. 931. *See also* Mississippi Fuel Corp. v. F.P.C., D.C. Cir., 281 F_2 919, 927; Sun Oil Co. v. F.P.C., 5 Cir., 256 F_2 233, 240-41; K. Davis, Administrative Law Treatise §§ 7.02 *et seq.* (1958). Accordingly, Teleco was not denied due process in the utility's promulgation of its foreign attachment tariffs.

Teleco also argues that Southwestern Bell waived its right to enforce the foreign attachment tariffs by reason of alleged lengthy prior notice of Teleco's direct connection to the Southwestern Bell network. Teleco relies upon the general rule that a party to a contract may waive a right thereunder by conduct indicating an intention to relinquish it. *See* Steiger v. Commerce Acceptance, Inc., 455 P_2 81, 89 (Okla.). We agree with the trial court that the general rule of waiver does not apply where, as here, a party's obligations are subject to approval and regulation by the state's

corporation commission. Under Oklahoma law, tariffs required to be filed with a regulatory body are more than merely the terms of contract between the regulated utility and its customers; they are the law. *See* Shehi v. Southwestern Bell Telephone Co., 10 Cir., 382 F_2 627, 629 n.2. Since the public has the right to nondiscriminatory application of such tariffs, Okla. Const. art. 9, § 18; AAAAAAAAAAAAAAAAAAAAAAA, Inc. v. Southwestern Bell Telephone Co., 373 P_2 31 (Okla.), the utility cannot be held to waive enforcement as to some, but not to others of its customers. *See* Komatz Construction Co. v. Western Union Tel. Co., 186 N.W.$_2$ 691, 698 (Minn.); *see also* Chicago, B. & O. Ry. v. Ready Mix Concrete Co., 8 Cir., 487 F_2 1263, 1266; Atchison, T. & S.F. Ry. v. John Sexton & Co., D. Kan., 339 F. Supp. 1202, 1206. Were we to hold otherwise we would defeat the equal enforcement of filed tariffs in violation of strong state policy to the contrary.

Teleco next contends that Southwestern Bell arbitrarily refused to install an electronic coupling device at Teleco's facilities. Had Southwestern Bell provided Teleco with the device as requested, Teleco argues, its own direct electrical connection in violation of the tariffs would have been unnecessary. Southwestern Bell replies that filed tariffs require the imposition of installation charges and a monthly use charge to customers wishing to connect privately-owned telephone equipment to the utility's network. Teleco advised Southwestern Bell that it would not pay these charges; Southwestern Bell refused to install the couplers until Teleco agreed to pay. The court below held on the basis of these undisputed facts that Southwestern Bell acted neither arbitrarily nor wrongfully in refusing to install a connecting device for Teleco.

Tariffs duly filed with the Corporation Commission bind both the utility and its customers. *See* Southwestern Bell Telephone Co. v. Cox, 375 P_2 972 (Okla.). Teleco does not apparently dispute the applicability of the tariff-specified charges to its desired connection. Had Southwestern

Bell therefore *not* insisted upon imposing charges for connection and coupler service, the utility would itself have violated the tariffs. Under these circumstances, the trial court correctly concluded as a matter of law that Southwestern Bell's refusal to provide service was neither arbitrary nor otherwise wrongful.

Finally, Teleco argues generally that Southwestern Bell's tariffs, including its foreign attachment tariffs, are unreasonable and unenforceable on a uniform basis; for these reasons, Teleco contends, the utility's enforcement of the tariffs against Teleco was wrongful. These contentions should be directed to the Oklahoma Corporation Commission, and not to the courts. The Oklahoma Supreme Court has interpreted article 9, section 18 of the state's constitution as directing that whenever "the validity of any rate or regulation prescribed by the Corporation Commission" must be determined as a basis for relief, the state's district courts are "without power to grant relief and . . . without jurisdiction of the subject matter of the action." Oklahoma Natural Gas Co. v. Bartlett-Collins Co., 230 P_2 481, 482 (Okla.). *See also* Chicago, R.I. & P. Ry. v. Brown, 232 P. 43 (Okla.). Since state law precludes state trial court jurisdiction over questions concerning the validity of regulations approved by the Commission, federal district courts sitting in diversity similarly lack jurisdiction. *See* Woods v. Interstate Realty Co., 337 U.S. 535; 1A J. Moore, Federal Practice ¶ 0.317[6] (2d ed. 1953). Thus the district court had no jurisdiction to determine the reasonableness of the tariffs challenged by Teleco.

The judgment of the district court is affirmed.

APPENDIX "C"

United States Constitution

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

Oklahoma Constitution, Art. 2, § 7

§ 7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

APPENDIX "E"

Oklahoma Constitution, Art. 7, § 1

§ 1. Courts in which judicial power vested

The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and

such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

Added State Question No. 448, Legislative Referendum No. 164, adopted election July 11, 1967.

Proposed by Laws 1967, p. 698, H.J.R. No. 508.

APPENDIX "F"

Oklahoma Constitution, Art. 9, § 19

§ 19. Powers of court of record—Additional powers—Failure or refusal to obey orders

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by en-

forcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

APPENDIX "G"

Oklahoma Constitution, Art. 9, § 18

§ 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or

transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its author-

ity to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

APPENDIX "H"

Oklahoma Constitution, Art. 9, §15

§ 15. Creation—Terms of office—Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: Provided, Corporation Commissioners first elected under this Constitution shall hold office as follows: One shall serve until the second Monday in January, nineteen hundred and nine; one until the second Monday in January, nineteen hundred and eleven; and one until the second Monday in January, nineteen hundred and thirteen; their terms to be decided by lot immediately after they shall have qualified. In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

APPENDIX "I"

RULES AND REGULATIONS

Order No. 68516
Cause No. 23713

Rule 1. *Filing of Tariff Offerings*

All telephone utilities shall file with the Commission schedules of rates for all general offerings of intrastate services, both exchange and long distance, together with rules and regulations covering all such offerings. Said rate schedules shall include sufficient explanatory materials, maps, effective date, definitions, etc., as to make their application understandable and definite.

Tariffs which do not establish rates for new offerings, or increase rates on existing offerings of communications service, will be submitted not less than thirty (30) days in advance of their proposed effective dates. If the Commission does not reject such tariff sheets in advance of their proposed effective dates, such tariffs shall be considered accepted by the Commission and binding upon the telephone company and the public, but shall not prejudice the Commission in any subsequent investigation.

Tariff sheets which establish rates for new offerings of service or increase rates on existing services shall be subject to the provisions of Rule 4 of this Order.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of May, 1975, I mailed three copies of the foregoing Petition for Writ of Certiorari, postage fully paid, to Robert D. Allen, 707 North Robinson, Oklahoma City, Oklahoma, Attorney for Respondent, Southwestern Bell Telephone Company.

James R. Eagleton